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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Definition of the Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules	)))	CS Docket No. 95-178

To: The Commission

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PETITION FOR RECONSIDERATION

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SUMMARY

Must-carry is crucial to the health of over-the-air broadcast Stations, and thus, to the public interest. The intent of the 1992 Cable Act will be best served by confining the Commission's review process to reconsideration of Grade B contour maps in deciding market modification petitions, as these contours best serve the goal of the market modification: determining a Station's economic market. The intent of the 1992 Cable Act will also be best served by removing the preclusive effect of market modification decisions made under ADI market definition where a Station's DMA market is dissimilar, and applying the DMA market definition as the basis for the Station's entitlement to carriage.

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PETITION FOR RECONSIDERATION

INTRODUCTION

Costa de Oro Television, Inc., the owner and operator of Station KJLA(TV), Ventura, California ("Costa"), by and through its counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby files a Petition for Reconsideration ("Petition") of the Order on Reconsideration and Second Report and Order, FCC 99-116, released May 26, 1999 ("Order").[1]

Petitioner specifically requests reconsideration of certain provisions of the Order dealing with issues raised in the Further Notice of Proposed Rulemaking, 11 FCC Rcd 6201 (1996). The first allows the Longley-Rice prediction methodology to be used in considering market modification petitions. The second permits rulings made utilizing Arbitron Areas of Dominant Influence ("ADI") market definition methodology to be binding upon a Station where the use of Nielson Media Research Designated Market Areas ("DMA") market definition methodology results in a change of that Station's market.

Petitioner asserts that the Longley-Rice prediction methodology should not be a factor in consideration of market modification petitions as it will operate to frustrate Congressional intent

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[1] This Petition is timely filed as the Order was published in the Federal Register on June 24, 1999. 64 Fed. Reg. 33788 (1999).

concerning the 1992 Cable Act. Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act"). Petitioner also asserts that decisions made utilizing ADI market definitions should not be binding where a DMA market definition results in a change of a Station's market as the new DMA market designation renders nil the preclusive effect of the ADI-based decision. In support of the Petition, Petitioner states as follows:

BACKGROUND

In 1992, Congress passed the Cable Act. Among the issues dealt with in the Cable Act were those of localism and the need to ensure the presence of local broadcast voices on cable television systems. See, Cable Act §2(a)(15), Pub. L. 102-385, 1992 U.S.C.C.A.N. (106 Stat.) 1462 (1992); 47 U.S.C. § 534. To that end, the Cable Act included provisions mandating the carriage of broadcast Stations on cable systems in order to "ensure that broadcast television remains available as a source of video programming for those without cable." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994); see, Order, at ¶38, n. 104. The resultant must-carry provisions mandate that cable operators must carry the signals of local commercial broadcast Stations. 47 U.S.C. §§ 534, 535. A "local commercial broadcast station" is defined as a Station "within the *same television market* as the cable system." 47 U.S.C. § 534(h)(1)(A) (emphasis added).

ADIs, as referred to in Section 73.3555(e)(2)(i) of the Commission's Rules, were used by the Commission as the standard for determining a Station's local market for the purposes of the must-carry provisions of the Cable Act. 47 U.S.C. § 534(h)(1)(C)(i); Order, ¶9. However, Arbitron discontinued active designation of ADIs, forcing the Commission, as of January 1, 2000, to utilize DMAs for the purpose of determining a Station's local market. 47 C.F.R. § 76.56(e)(2).

Provisions were included in the Cable Act for the Commission, upon written request, to modify a determination of a broadcast Station's market, and include or exclude communities within a Station's market in order "to better effectuate the purposes" of the Act. 47 U.S.C. § 534(h)(1)(C)(i); 47 C.F.R. § 76.59. Such modification is allowed only "to ensure that television stations [are] carried in the areas which they serve *and which form their economic market*." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992) (emphasis added). Adjudication of a request to modify a Station's market includes consideration of factors such as (1) historical carriage of the Station or other local broadcast Stations on the cable system; (2) level of local service provided by the broadcast Station to the community; (3) whether other broadcast Stations provide local coverage to the community; and (4) evidence of viewing patterns in the cable system's community. 47 U.S.C. § 534(h)(1)(C)(ii).

As a result of the switch from the use of ADIs to DMAs, the Commission embarked on this proceeding, resulting in the Order. This was due, in part, to the fact that the designated local market of some Stations will be altered as a result of the switch from ADI to DMA market definition. Order, ¶11. The express intent of the Order is to deal with issues arising from the alteration of the local market designations of some broadcast Stations and the resultant effect on must-carry rights.

Costa, a minority-controlled entity, is the owner and operator of a full-power independent television station licensed to the community of Ventura in Ventura County, California. Under the ADI system, KJLA had been mistakenly treated as being in the Santa Barbara local market.[2]

[2] Costa has in the past contested the Commission's treatment of Costa in the Santa Barbara market on the basis that Ventura is in the Los Angeles DMA. See, In re Petition of Costa de Oro Television, Inc., DA 98-346, released February 25, 1998.

However, under the DMA system, KJLA is, without question, assigned to the Los Angeles television market. KJLA's must-carry rights will be affected by the change in the designation of local market, as Costa now must seek carriage, pursuant to Section 76.64(f)(2), on or before October 1, 1999, on Los Angeles cable television systems.

ARGUMENT

I The Commission Should Confine Itself to the Use of Grade B Contours in Consideration of Market Modification Petitions

In the Order, the Commission responded to comments concerning what changes may be necessary as a result of the switch to DMA market definition methodology. Order, ¶44. In Paragraph 50, the Commission encourages parties seeking market modification to submit maps utilizing the Longley-Rice prediction methodology. Order, ¶50. Costa asserts that such consideration is contrary to the intent of the Cable Act. Permitting cable systems to use the Longley-Rice methodology in filing market modification petitions will improperly provide them with yet another quiver in their bow with which to avoid their must-carry obligations and counteract the presumption of the carriage of broadcast Stations in their DMAs. As such, the Commission should confine itself to the use of contour maps, using the Commission's 50/50 field strength contours,[3] showing predicted contours in consideration of market modification petitions.

The Commission may modify markets on a case-by-case basis, upon petition. However, Congress expressly stated that "[i]t is not the Committee's intention that these provisions [for market modification] be used by cable systems to manipulate their carriage obligation to avoid compliance with the objectives of this section." H.R. Rep. No. 102-628, at 97-98 (1992). The

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[3] 47 C.F.R. § 73.684.

clear congressional intent of the Cable Act is that cable systems must carry local commercial television Stations in their markets. 47 U.S.C. § 534(a) and (h)(1)(A). In fact, the presumption is that local Stations will be carried in the ADIs, or, as of January 1, 2000, the DMAs, in which they are located. WLNY-TV, Inc. v. Federal Communications Commission, 163 F.3d 137, 144 (2nd Cir. 1998).

Under the new DMA market definition methodology, KJLA is now treated as a Los Angeles television market Station.[4]

The Commission permits cable systems to utilize Grade B contour maps to elucidate the geographical boundary of a Station's market. The Commission has allowed these submissions because Grade B maps serve as an accurate measure of the factor that governs Stations' entitlements to cable carriage: a Station's economic market. See, e.g., H.R. Rep. 102-628 at 97 (stating petitions for market modification are available only in order "to ensure that television stations [are] carried in the areas which . . . form their economic market"); Amendment of Section 76.51, 102 FCC 2d 1062, 1070 (1985) ("[w]e believe that television stations actually do or logically can rely on the area within their Grade B contours for economic support").

Encouraging the use of Longley-Rice evidence will produce a kind of map-shopping in which a cable system will put forth as evidence the map, be it Grade B or Longley-Rice, that most favors its attempt to wipe the broadcast Station off of its cable system. Such map-shopping will in no way serve that purpose of modification petitions: determination of a Station's proper

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[4] Costa has, on its own, sought, in the past, to modify its market to include portions of the Los Angeles DMA. In re Petition of Costa de Oro Television, Inc., DA 98-346, released February 25, 1998. The decision of the Cable Services Bureau in this matter is presently pending on reconsideration before the Bureau.

economic market. This ability will only serve to give cable systems additional ammunition with which to avoid the Cable Act's must-carry obligations and the presumption of carriage of broadcast Station's in their DMAs.

Congress anticipated cable systems would take such actions when it found that cable systems, given competition for advertising dollars from broadcast stations, would delete, reposition, or fail to carry broadcast Stations due to the lack of economic incentive to do so. Cable Act §2(a)(15), Pub. L. 102-385, 1992 U.S.C.C.A.N. (106 Stat.) 1462 (1992). Must-carry was created in order to preclude such actions by cable systems. But allowance for use of Longley-Rice methodology will enable cable systems once again to seek to avoid carrying broadcast Stations, frustrating Congressional intent.

The logic is clear: Congress has expressly stated its intent that cable systems carry local broadcast Stations. 47 U.S.C. § 534. The courts have stated the presumption that such carriage occur within a broadcast Stations market. WLNY-TV v. Federal Communications Commission, supra, 163 F.3d at 144. Although Congress has provided for market modification in order to ensure television Stations are carried in their economic market, it has stated its intention that market modification petitions not be used by cable systems to avoid their must-carry obligations. The Commission has concluded that the use of Grade B contours best serves the goal of market modification: determining a Station's natural economic market. Amendment of Section 76.51, supra, 102 FCC 2d at 1070. As such, it is clear the use of Longley-Rice maps will only serve to frustrate Congressional intent by turning the process into a game of what predictive method will work best.[5]

In deciding to allow cable systems to avoid carriage obligations through the selective use of Longley-Rice maps, the Commission failed to address whether this fundamental change in policy would harm UHF Stations disproportionally, thus reintroducing the "UHF handicap" Congress sought to eliminate by granting all stations must-carry status throughout their designated television market, rather than by their Grade B contours, or other measures. See, OET Bulletin 69, July 2, 1997 (UHF dipole factor included to try and eliminate some of the handicap placed on UHF Stations under Longley-Rice). Since both Congress and the Supreme Court pointed specifically at struggling Stations, most of which operate on UHF frequencies, as those the Cable Act was designed to cover, any change of policy which treats UHF Stations less favorably than VHF Stations runs counter to a specific Congressional finding held to be constitutional by the Supreme Court. Turner Broadcasting System v. United States, 520 U.S. 180 (1997) (independent local broadcasters tend to be the closest substitutes for cable programs, and thus the most likely to be dropped); Cable Act, Pub. L. 102-385, Section 2(a) (economic

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[5] Use of Longley-Rice evidence by cable systems will also impose hardship upon Costa in contesting market modification petitions, contrary to Commission intent. The Commission has stated that Stations such as KJLA (specialty stations without network affiliations that target minority and other communities) should receive special consideration during the market modification process: "Separate from . . . the four statutory criteria . . . the Commission will consider whether extreme hardship is imposed on small . . . broadcast stations, often unaffiliated with the top networks, by the DMA conversion process." Order. ¶38. KJLAC is exactly the type of Station anticipated by this statement, and as such, deserves the stated special consideration. The use of Longley-Rice evidence will cause hardship to KJLA as it may complicate the market modification process, and force KJLA, if it has to respond to petitions, to undertake to obtain expensive Longley-Rice research and respond to the expensive and time-consuming litigation. Such a hardship is contrary to the Commission's own stated intent.

viability of Stations not carried by cable is threatened). The Commission should thus reexamine this issue for a full determination of whether use of Longley-Rice calculations would adversely impact UHF Stations vis-a-vis VHF Stations.

In conclusion, the provision for consideration of Longley-Rice maps frustrates clearly expressed intentions and presumptions of both Congress and the Commission, providing cable systems with a method with which to seek to avoid their obligations. Costa urges the Commission to confine itself to the consideration of Grade B predicted contour maps in the consideration of market modification petitions.

II A Change of Local Market Under the New DMA Market Definition Renders Market Modification Cases Decided Under ADI Market Definition Inapplicable

In Paragraph 42 and 43 of the Order, the Commission stated that it would leave intact final market modification cases in order to avoid disturbing settled expectations, and that decisions to delete a community from a market would remain in effect after the conversion to DMA market definition. Order, ¶¶42-43. Costa asserts that this policy is in error. While such a policy may make sense if a market has not been changed, Costa submits that where a change from an ADI to a DMA market definition results in a new market for a Station, decisions based on a party being in another market should not have precedential effect, and the DMA should control.

Simple common sense dictates that where a decision is based on criteria that has subsequently changed, that decision should no longer have effect. Market modification decisions made as to KJLA were made, in part, based upon the fact that KJLA's market was, under ADI market definition, Santa Barbara. However, KJLA's market is now, under the DMA market definition, Los Angeles. Decisions which do not take this change of market, from Santa Barbara to Los Angles, into account should no longer have effect.

This conclusion is supported by the fact that the Second Circuit has found that a presumption exists that local stations will be carried in the DMAs in which they are located. WLNY-TV v. Federal Communications Commission, supra, 163 F.3d 144. If the initial presumption from which any market modification decision flows, the DMA of a Station has been altered, decisions based thereon must also change accordingly.

The law clearly supports this conclusion. To give effect to a prior decision with commonalities of parties and issues is to give that prior decision preclusive effect under the doctrines of collateral estoppel and res judicata. See, e.g., Stanton v. District of Columbia Court of Appeals, 127 F.3d 72 (D.C. Cir. 1997). Common-law doctrines of collateral estoppel and res judicata are applicable to agency determinations made when acting in a judicial capacity. See, e.g., Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991). The law clearly states that changes in law or fact will render inapplicable the doctrines of collateral estoppel and res judicata. Community Hospital v. Sullivan, 986 F.2d 357 (10th Cir. 1993); Jaffree v. Wallace, 837 F.2d 1461 (11th Cir. 1988).

As such, no matter whether the change from ADI to DMA market criteria is one of law or fact, the conclusion is the same: Decisions made applying the ADI market definition should not have precedential effect where a Station's DMA market definition, resulting from the movement of a Station from one market to another, is different.

This conclusion is supported by the Commission's own findings. In holding that a final order modifying a cable system's market will "trump" a change in market from ADIs to DMAs, the Commission concluded that few, if any, cases decided under Section 614(h) involved a market change. Order, ¶42. In Costa's case, however, just such a change is involved and in a very peculiar way. Costa is in the truly unique situation where no counties will change markets in the switch from ADIs to DMAs, and no cable systems will change markets. Only *KJLA* will change markets. This is because KJLA was purportedly assigned to the Santa Barbara ADI while Ventura County remained in the Los Angeles ADI. Now, for the first time, both the county and the Station will be in the same market, Los Angeles. The Bureau noted this fact in Comcast Cablevison of Santa Maria, DA 98-2577, released December 22, 1998, where it limited KJLA's carriage rights in the Santa Barbara market because the Station would gain carriage rights in the Los Angeles market, beginning on January 1, 2000.[6] To now establish a policy where KJLA's market designation is trumped by a future decision[7] based on its ADI designation of Santa Barbara leaves KJLA in a must-carry "no-man's land."

Costa submits, therefore, that in an instance where a Station's market (as opposed to a cable system's market) changes between ADI and DMA designations, the DMA designation must govern must-carry rights over a Section 614(h) order. Such a ruling would avoid the problem of wholesale changes to must-carry obligation which would result if a cable system changed markets, while recognizing both Congressional intent and past Commission precedent that makes clear that a Station's designated market is where it is to look for audience, economic support, and carriage.

[6] "We also not that as of January 1, 2000, KJLA will be designated as part of the Los Angeles Designated Market Area (DMA), and will accordingly have must-carry rights in that market and not in its current ADI." Id. at ¶16 (footnote omitted).

[7] As noted supra, note 4, the Bureau's order granting KJLA partial carriage rights in Los Angeles County is pending before the Cable Service Bureau and not yet final.

CONCLUSION

Must-carry is crucial to the health of over-the-air broadcast stations, and thus, to the public interest. The intent of the Cable Act will be best served by confining the Commission to consideration of Grade B contour maps in deciding market modification petitions, removing the preclusive effect of market modification decisions made under ADI market definition where a station's DMA market is dissimilar, and applying the DMA market definition as the basis for the Station's entitlement to carriage.

Respectfully submitted,

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